

STATE OF MICHIGAN
COURT OF APPEALS

NICHOLAS GILBERT MORRIS,

Plaintiff/Appellee-Cross-Appellant,

v

JODI LYNN MORRIS,

Defendant/Appellant-Cross-
Appellee.

UNPUBLISHED

January 31, 2012

No. 301555

Montcalm Circuit Court

LC No. 08-010501-DM

Before: HOEKSTRA, P.J., and K.F. KELLY and BECKERING, JJ.

PER CURIAM.

Defendant wife appeals as of right from a judgment of divorce, challenging the trial court's distribution of the marital estate, an award of \$400 a month to defendant in spousal support, and an award of \$5,000 toward defendant's attorney fees. Plaintiff husband also appeals as of right, challenging the trial court's distribution of the estate and the award of spousal support. We affirm as to the disposition of property and spousal support, but remand for further proceedings on the issue of attorney fees.

I. BASIC FACTS

The parties were married for 25 years and had five children, only one of whom was a minor at the time the judgment of divorce was entered. The parties had what could be referred as "a traditional marriage" in which plaintiff was the primary income-earner and defendant stayed home with the children. Plaintiff had two businesses: Nick Morris Builders (a sole proprietorship engaged in construction work) and Amsden Enterprises, LLC (a company formed to own and operate rental properties). Plaintiff also sold storage sheds built by the Amish and delivered by plaintiff to various locations. For many years, business went well and the parties enjoyed a comfortable lifestyle.

Plaintiff filed for divorce in May 2008. The parties could not agree on custody of the minor children nor could they agree on the division of marital assets. The proceedings quickly became contentious and protracted, with numerous motions and lengthy depositions. In January 2009, a hearing was held on defendant's motions for temporary support and for an appraisal of plaintiff's businesses. Defendant's attorney admitted that he could not make a cogent argument for temporary spousal support without first looking at the much-needed business valuation information. At the hearing, plaintiff testified that he was without any source of income and had

not worked since August 2008. He was involved in two industries that were particularly hard-hit by the economic downturn – construction and real estate. The trial court ultimately ordered the parties to consult with Mark Heath, an accountant and tax professional. Heath conducted an independent business valuation in order to determine plaintiff's available income for payment of spousal support.

At trial, plaintiff testified that his work in the construction industry had taken him out of the state on many occasions. In 2008, plaintiff spent a substantial amount of the year in North Carolina. In order to save money, plaintiff rented an apartment for his employees, which was more economical than staying in a hotel. Plaintiff also admitted to paying for his own apartment, which he shared with his girlfriend and her two children. He paid \$935 per month in rent between September 2008 and January 2009. Although plaintiff admitted that he received income while working in North Carolina in 2008, acknowledging a job for a client named Dr. Kumar between September and December 2008, plaintiff testified that Dr. Kumar stopped the job and confiscated his tools until the sheriff helped plaintiff recover them. Plaintiff was never fully compensated for the work. Plaintiff stayed in North Carolina for the first half of 2009 because he was optimistic about a potential construction job. During that time, plaintiff and his girlfriend lived in \$700 a month apartment for which plaintiff paid the first two months' rent. After that, plaintiff testified he ran out of money and his girlfriend began paying. They moved back to Michigan in May 2009 when the construction job fell through.

Plaintiff testified that he tried to find work since filing for divorce, but that the depressed market had made it difficult. He did not get any construction jobs in 2009, and earned some money doing a few roofing jobs. Opportunities for future construction projects were dim because plaintiff did not have a line of credit to enable him to start a project. Plaintiff testified that Nick Morris Builders effectively ceased to exist. Plaintiff gave the shed business to his father, Gilbert Morris, because plaintiff lacked the finances to continue business operations. He still sold sheds on his father's behalf and was paid between \$50 and \$100 for doing so. Other than some training as an auto mechanic, plaintiff did not have any post-secondary education. Plaintiff tried getting work as a truck driver, a lumber installer, a satellite TV installer, and an hourly employee, but was unsuccessful. Plaintiff testified that he had negative income in 2009. He was sharing a mobile home with his girlfriend, but could not afford to pay rent due to lack of work. Plaintiff had an IRA worth approximately \$15,000. His father bought him a 1996 Chevy pickup truck worth approximately \$2,500 that he intended to pay back.

Plaintiff admitted that he drew down \$30,000 on a line of credit through Greenpoint Mortgage and deposited it in his bank account. Both plaintiff and defendant were jointly named on the line of credit, but plaintiff did not consult defendant when he made the draw. Plaintiff paid his former attorney approximately \$43,000 in legal fees, the bulk of which were paid from the draw.

Defendant testified that plaintiff earned a far greater amount than what was demonstrated by his tax returns by "flipping" properties. In their 25-year marriage, defendant learned that plaintiff was savvy in manipulating the numbers to show less income, utilizing the tax code in his favor. While defendant knew plaintiff was underreporting his income, she did not believe it was illegal because it was common practice with small construction businesses. Defendant testified that plaintiff structured his finances in order to show a negative income in the hopes that

he would not have to pay spousal support. In fact, defendant believed that plaintiff purposefully allowed them to fall into financial ruin in retaliation for her decision to hire an attorney in the divorce proceedings. She believed plaintiff dragged out the legal proceedings by making frivolous time-consuming motions. Defendant had no doubt that, once the divorce was finalized, plaintiff would get many new jobs and become a success once again. She disputed that plaintiff had relinquished the shed business to his father; rather, plaintiff's name remained on the brochures for the sheds. Defendant believed that the existing sheds were marital property and that plaintiff had no right to simply give the shed business or the sheds to his father.

Defendant testified that she spent most the marriage at home, taking care of the children. Beginning in 2005, she worked for a three year period as a sign language interpreter for the school district, but was required to finish additional schooling and training to keep the job and opted not to do so. She currently earned approximately \$10 an hour working at Lowe's an average of 17 hours a week. She also earned approximately \$250 a month cleaning houses. Her total income for 2009 was \$13,690. Defendant drove a 2005 Chevy Impala for which there was no equity because she was still paying on the car loan. She paid \$161 a month in child support. Defendant was living with her mother and step-father because she could not afford to live on her own.

At trial, accountant Mark Heath testified that, in providing a valuation of the businesses, he used a combination of methods of valuation, taking into consideration both the present-day reality of the decreased demand for construction service and plummeting property values as well as the historical performance of the businesses over the past five years. In so doing, Heath surmised that that Nick Morris Builders was valued at \$7,446 and Amsden Enterprises was valued at \$10,920, for an aggregate total of \$18,366. The sale of sheds was included in the Nick Morris Builders' valuation. Plaintiff sold approximately thirty sheds in 2008, averaging income between \$100 and \$200 on the sale of each. Using the average cash flow available from both businesses, Heath concluded that plaintiff had \$15,291 of income available for the purpose of calculating spousal support. Heath did not think that plaintiff had concealed sources of income. Heath's valuations were based on plaintiff's tax returns, personal financial statements, credit card statements, loan application, and banking accounts. Heath acknowledged that plaintiff had deposited approximately \$55,000 between September and November of 2008, which occurred when plaintiff was allegedly out of work. Heath did not find this unusual because the deposits did not exceed plaintiff's gross income reported in his 2008 tax return, which was \$196,000. He also said that he knew plaintiff made an additional \$50,000 deposit into his account on November 24, 2008. Heath believed that plaintiff's extensive travel expenses for 2008 were legitimate, including two apartments he rented in North Carolina while doing construction work – one was for his crew and one plaintiff shared with his girlfriend and her two children. Heath admitted that he was shocked when he learned that plaintiff spent \$43,000 in legal fees in 2008.

Neither party was pleased with Heath's determination. Plaintiff believed Heath overvalued Amsden, in light of the fact that several of the properties were vacant, not generating income, and had negative value. For her part, defendant believed that Heath should have delved further back in time to arrive at a much larger average yearly income. Defendant also argued that Heath's analysis was faulty because Heath relied exclusively on information provided by plaintiff.

Jeffrey Loomis of Commercial Bank testified that he was working with plaintiff on restructuring mortgage loans on the Amsden rental properties. Due to the collapse of the housing market, plaintiff owed far more than the properties were worth. The bank was no longer willing to make loans to plaintiff, given the nature of his businesses and the current market. Plaintiff's line of credit was revoked due to insufficient cash flow and high risk. Plaintiff was required to submit annual personal financial statements. Loomis testified that plaintiff reported his net worth in January 2008 as \$581,733, but plummeted to \$180,500 in January 2009. As of February 2010, plaintiff's net worth had sunk to \$18,336. Loomis was a personal acquaintance of both plaintiff and defendant. He did not doubt the veracity of plaintiff's personal financial statements.

During trial, the parties entered into a partial settlement agreement on the record regarding a number of personal assets. They each agreed to keep the personal property in their possession. The agreement did not include the parties' respective automobiles. Plaintiff agreed that defendant should retain her inherited one-fifteenth interest in real estate from her deceased grandmother and that the property should not be considered part of the marital estate.

The parties' eldest son, Levi Morris, began to testify regarding a physical altercation he had with his mother. However, following a bench conference, the parties then stipulated that fault was not at issue and that Levi's testimony was irrelevant.

The trial court previously ordered that the parties' properties be placed for sale, with the proceeds going in a trust account held by defendant's attorney. At the time of trial, approximately \$38,000 was in the trust account. The trial court ordered that Heath be paid \$1,300 out of the account for his valuation efforts. Another \$10,000 was to be released for payment of the parties' property taxes (not including their home, which had been foreclosed upon). The trial court also awarded \$5,000 from the account to pay toward defendant's attorney fees. The trial court allowed plaintiff to maintain ownership of Amsden and Nick Morris Builders. It essentially awarded defendant 53% of all marital assets and awarded plaintiff 47% of the marital assets. The trial court ordered plaintiff to pay monthly spousal support in the amount of \$400 a month. Both parties now appeal as of right.

II. MARITAL PROPERTY VALUATION AND DISTRIBUTION

Both parties are dissatisfied with the trial court's distribution of marital assets. Defendant argues that the trial court erred by: 1) failing to place value on all marital assets; 2) failing to offset property distributed to plaintiff with a corresponding cash award to defendant for her share of the property; and 3) inequitably dividing the estate between the parties. For his part, plaintiff argues that the trial court erred by: 1) granting defendant a larger portion of the marital estate; and, 2) improperly considering fault when the parties specifically agreed that fault was a non-issue. We disagree with both parties. In a divorce action, we give deference to the trial court, reviewing its factual findings for clear error. *Cunningham v Cunningham*, 289 Mich App 195, 200; 795 NW2d 826 (2010). "A trial court's findings of fact are inadequate if they are not sufficiently specific to enable the parties to determine the approximate values of their individual awards by consulting the verdict along with the valuations to which they stipulated." *Woodington v Shokoohi*, 288 Mich App 352, 364-365; 792 NW2d 63 (2010). The trial court's decisions on questions of law are reviewed de novo on appeal. *Cunningham*, 289 Mich App at

200. A trial court's dispositional ruling will be upheld if fair and equitable in light of the court's factual findings, and we reverse only if we are left with a definite and firm conviction that the property distribution is inequitable. *Woodington*, 288 Mich App at 365.

In a judgment of divorce, the trial court must make a full determination of the parties' respective property rights in the marital estate. MCR 3.211(B)(3). In doing so, the court must make an equitable distribution of the marital estate, which includes all marital assets (property that came "to either party by reason of the marriage"); while the distribution need not be equally divided or mathematically precise, the trial court is required to place a value on all disputed property in order to make a proper distribution. *Woodington*, 288 Mich App at 358, 365; *Olson v Olson*, 256 Mich App 619, 627-628; 671 NW2d 64 (2003). "[W]hen a party has dissipated marital assets without the fault of the other spouse, the value of the dissipated assets may be included in the marital estate." *Woodington*, 288 Mich App at 368. Notwithstanding the parties' failure to present evidence regarding the disputed property values, a court's failure to place a value on marital property in dispute between the parties constitutes reversible error. *Olson*, 256 Mich App at 628. Ultimately, the marital estate must be distributed in a manner that is equitable in light of all the circumstances of the case, and the trial court should not be concerned with punishing either party for past mistakes. *Berger v Berger*, 277 Mich App 700, 716-717, 721; 747 NW2d 336 (2008). In addition to other relevant factors, the trial court should consider the following (if relevant) when dividing the marital estate: (1) the duration of the marriage; (2) the parties' contributions to the marital estate; (3) the parties' ages; (4) the parties' health; (5) the parties' present living situations; (6) necessities of the parties; (7) the parties' earning capacities; (8) the parties' past behavior and conduct; and (9) principles of equity. *Berger*, 277 Mich App at 717. In so doing, the court must be careful to "not assign disproportionate weight to any one circumstance." *Id.* at 717, quoting *Sparks v Sparks*, 440 Mich 141, 158; 485 NW2d 893 (1992).

The trial court considered the relevant factors when dividing the estate by giving 47 percent to plaintiff and 53 percent to defendant. The parties were married for over 25 years. They both contributed to the marital estate – plaintiff by working at various jobs and defendant by taking care of the home and children and providing plaintiff the opportunity to further his business interests. Plaintiff was 50 years old and defendant was 45 years old. They were both in good health. They were both living with and relying upon others to help them with their living expenses. Regarding earning capacity of the parties, the trial court noted:

This Court takes note of the estimated value of Amsden Enterprises and Nick Morris Builder[]s LLC by Mr. Mark Heath, an accountant with Data Specialists. Mr. Heath is an individual who was previously determined to be an expert by this Court's predecessor for business valuation. He estimated the combined value of both businesses at \$15,291 per year.¹ Both parties take issue

¹ This is a misstatement – Heath testified that Nick Morris Builders was valued at \$7,446 and Amsden Enterprises was valued at \$10,920, for an aggregate total of \$18,366. This was not an annual figure. However, Heath testified that plaintiff's income was \$15,291 per year for purposes of calculating spousal support.

with this amount but the Plaintiff is willing to accept it. Counsel for Defendant challenged the expert's credentials and argued that his valuation lacked a forensic accounting analysis. Defense counsel argued based upon a combined cash flow/income and accumulated asset approach, that a more realistic valuation of the businesses would be much, much higher. In considering the respective arguments of the parties, this Court is mindful of the Defendant's credible testimony that the Plaintiff was careful throughout their marriage to reinvest in ways to show for tax purposes a loss or to minimize income. This Court finds that the Plaintiff has not vested himself in earning income during these proceedings. For these reasons, this Court conservatively assesses and attributes income ability to the marital [sic] businesses of \$35,000 per year in annual income.

Although the parties had stipulated that fault was not an issue for trial, the trial court looked to plaintiff's prior misconduct:

The Plaintiff's girlfriend testified at trial and they readily admit that she and her children accompanied him out of state and lived with him while he did a job in North Carolina during the pendency of these proceedings. As a result, the Plaintiff incurred substantial additional expense in housing for that family unit separate from the expenses he incurred for his work crew. It is also significant that during this time period, he discontinued payments on the marital home, even though he was the custodial parent and the children were living in the home. The home was ultimately lost through foreclosure. It also concerns the undersigned that during a hearing on the Defendant's Motion for Spousal [S]upport, the Plaintiff testified that he had not earned any income and yet at trial, it was clear that he had received a significant lump sum within a month or so prior to the hearing.

Of further concern is the imbalance of power within the marriage. The Plaintiff had total control of the finances. The Defendant testified that at two different time during the marriage, the Plaintiff became angry and would not speak to her for three months. She testified that the Plaintiff is a great leader and she, in their marriage, was a great follower. She testified that she learned early in the marriage that she should not cross him or she would pay. She testified that the Plaintiff told her in March 2008 that she was no longer of any value to him and that she should not think about getting an attorney or she would be sorry.

The trial court also considered "any other equitable circumstances," noting:

In addition to this Court's finding as set forth above that the Plaintiff has not fully invested himself in the continuation of the marital businesses following the parties' separation, this Court finds that the extent of marital funds the Plaintiff invested in the payment of attorney fees, over \$43,672 early in these proceedings, was unreasonable. During the course of these proceedings Plaintiff employed three different attorneys. Extensive proceedings beginning in October 2008 focused on an attempt to disqualify the undersigned's predecessor which did

not make sense for a variety of reasons. The alleged conflict did not relate to either of the parties or the attorney but rather a law clerk employed by the firm. In addition, the retirement of the assigned judge was imminent such that it was unrealistic to expect trial to be conducted before the end of the term. This Court recognizes that the Plaintiff did ultimately secure alternate counsel and to the credit of his present, he has tried to minimize expense. Unfortunately, however, the liquidation of marital assets was fairly complete by the time Plaintiff's present counsel was retained.

This Court also finds the testimony by the Plaintiff and his girlfriend suspect as to the transfer of the shed business to his father without any compensation. The Defendant testified that he is still involved with delivering the sheds on occasion and his girlfriend testified that she takes calls for the sheds yet both indicate that [sic] receive no compensation for their sale.

The Plaintiff in his testimony presented as a very likeable, straight forward individual who just wants to get this matter finalized. His actions via a thorough review of this file are not in keeping with his verbalized position. In addition, his current circumstances, as he presents them however, given his experience, past practices and ingenuity are simply not in keeping with his proven ability to provide for his family.

Contrary to defendant's contention, we believe that the trial court, in fact, properly considered the value of both Nick Morris Builders and Amsden before awarding both properties to plaintiff. Although the trial court misstated Heath's testimony when it stated that combined value of both businesses was \$15,291 per year, we do not find the misstatement to be determinative. Heath testified that Nick Morris Builders was valued at \$7,446 (which included the shed business) and Amsden Enterprises was valued at \$10,920, for an aggregate total of \$18,366. Heath testified that plaintiff's income was \$15,291 per year for purposes of calculating spousal support. Although the trial court referred to the wrong figure, it was clearly adopting Heath's valuations. These businesses were sole proprietorships that had no value beyond plaintiff's own efforts. If he did not work, there was no income. Defendant did not, as she argues, go uncompensated for her interest in the businesses. She was awarded a greater percentage of the marital estate and, finding that plaintiff did not put forth his full efforts at obtaining work, the trial court imputed an annual income onto plaintiff of \$35,000.

Nor do we think that the trial court erred in allowing each party to keep his or her respective vehicles without first assigning valuations to each. Plaintiff testified that he drove a 1996 pickup truck that his father bought for him. There was no evidence as to the vehicle's worth other than plaintiff's testimony that his father paid \$2,500 for it and that it was not as nice as defendant's 2005 Chevy Impala. However, plaintiff also testified that even though his father "gave" him the truck, he felt obligated to repay. Thus, it could be argued that neither vehicle had any worth, as they were both encumbered.

We believe that the trial court considered all the relevant evidence and methodically distributed the marital assets in a manner that was equitable under the circumstances. The trial court's findings that plaintiff delayed the divorce proceedings, concealed sources of income, and

intentionally depleted the marital estate by paying unreasonable attorney fees and giving the shed business to his father, justified an uneven distribution of the remaining marital estate. We do not find, as plaintiff contends, that the trial court improperly considered plaintiff's fault in the breakdown of the marriage. The trial court did not concern itself with the cause of the breakdown of the marriage; rather, the trial court focused primarily on plaintiff's conduct once the parties had already separated and plaintiff had filed for divorce. The trial court was not looking to assess fault for the breakdown of the marriage so much as looking to other possible wrong-doing that placed the parties in disparate financial positions. This included plaintiff's depletion of marital assets through payment of exorbitant legal fees and maintaining a separate household with his girlfriend in North Carolina. Although the trial court referred to the "imbalance of power within the marriage," it did not do so in order to find that plaintiff was the cause for the breakdown of the marriage, but to point out the parties' positions regarding the family's finances and power-sharing. Plaintiff's prior domineering behavior supported a finding that he allowed the couple to fall into financial ruin in retaliation for defendant's fighting the divorce and hiring a lawyer. We therefore conclude that the trial court did not improperly consider fault when distributing the marital estate.

Although defendant argues she was entitled to a greater share of the estate, suggesting a distribution of 60 percent in her favor, the sad reality was that, at the time of the divorce, neither party was able to cover his or her own living expenses. There were little to no assets available for the support of either party. While the trial court properly considered plaintiff's behavior in ordering a slightly disparate distribution, the trial court properly refused to further impoverish plaintiff as punishment for wrong-doing. Both parties will be starting from scratch. Should plaintiff become a success in business once again, defendant will be able to move to modify the support order, but the trial court's ultimate distribution was fair and equitable in light of the court's factual findings. We are not left with a definite and firm conviction that the property distribution was inequitable.

III. SPOUSAL SUPPORT

Defendant argues that the trial court abused its discretion when it awarded her only \$400 a month in spousal support and failed to sua sponte award retroactive interim spousal support from January 2009 to September 2010. She maintains that, although the trial court used the proper legal test and evaluated all of the relevant factors, its ultimate ruling was inconsistent with its factual findings and that a much larger award was called for. In contrast, plaintiff argues that defendant was entitled to no spousal support, claiming that defendant did not contribute to the marital estate because she made the decision not to work. Plaintiff also argues that the trial court's findings regarding his capacity to earn income failed to take into consideration the fact that his skills were unmarketable and unprofitable in this economy. Plaintiff argues that he was unable to pay his own living expenses and should not have been ordered to pay any spousal support at all. We find that the trial court's spousal support award was proper under the circumstances of this case. We further find that defendant's claim for retroactive interim support must fail, as the issue was not properly preserved for appellate review. We review a trial court's award of spousal support for an abuse of discretion. *Olson*, 256 Mich App at 631. An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes. *Woodington*, 288 Mich App at 355. The trial court's findings of fact relating to an award of spousal support are reviewed for clear error. *Id.*

“The objective of spousal support is to balance the incomes and needs of the parties in a way that will not impoverish either party, and support is to be based on what is just and reasonable under the circumstances of the case.” *Woodington*, 288 Mich App at 356. In rendering a decision on alimony, the trial court should consider the following factors: (1) the past relations and conduct of the parties; (2) the length of the marriage; (3) the parties’ respective abilities to work; (4) the sources and amount of property distributed to the parties; (5) the parties’ respective ages; (6) the parties’ respective ability to pay spousal support; (7) the present living situation of the parties; (8) the parties’ needs; (9) the parties’ current health status; (10) the parties’ prior standard of living, including whether they are responsible for supporting others (e.g. minor children); (11) the parties’ contributions to the joint marital estate; (12) any fault contributing to the divorce; (13) impact of cohabitation on each party’s finances; and (14) principles of equity. *Id.* The trial court should make specific factual findings on each factor that is relevant to the particular case. *Korth v Korth*, 256 Mich App 286, 289; 662 NW2d 111 (2003).

In ordering plaintiff to pay defendant spousal support in the amount of \$400 per month, the trial court stated: “Given this Court’s consideration of the facts and findings set forth above, it is determined that payment of spousal support by Plaintiff to Defendant pursuant to Michigan law is appropriate. This finding is based upon the length of and her investment in the marriage, the disparate income earning ability of the parties and the Defendant’s need for spousal support so that she can obtain living arrangements independent of her mother.” Although the trial court did not enumerate each of the factors listed above, we believe that the trial court’s reference to its “consideration of the facts and findings set forth above” is a clear indication that all of the factors the trial court considered in the distribution of the marital estate also factored into the court’s decision on spousal support. Again, these findings are supported by the record, most notably the disparate income-earning capacity of each party. The trial court properly imputed income onto to plaintiff in the amount of \$35,000 a year. In light of the fact that defendant earned less than \$15,000 a year with little potential for earning much more in the future, we find that the trial court did not abuse its discretion in awarding defendant \$400 a month in alimony. Again, the trial court’s ruling was just under the circumstances and was not meant to impoverish or punish plaintiff.

Defendant claims that the trial court should have granted retroactive interim support, especially where plaintiff lied during a January 2009 hearing when he said that he had no income and had not worked since August 2008 when, in fact, he made several substantial deposits in the fall of 2008. Defendant maintains that plaintiff should not be allowed to reap the benefit of his concealment of large sources of income. We find that the issue is not properly before us. Defendant initially moved for interim support in December 2008. However, at the January 2009 hearing, the focus was on the need to have the businesses and properties appraised. Defendant’s attorney stated “[w]e’d like to reserve the issue of spousal support until we have the numbers from the appraisal company.” The matter was never ruled upon and defendant did not pursue it. An issue not addressed by the trial court is not preserved for appeal. *Fast Air, Inc v Knight*, 235 Mich App 541, 549, 599 NW2d 489 (1999). We therefore reject defendant’s contention that the trial court was required to sua sponte order interim support.

IV. ATTORNEY FEES

Defendant argues that the trial court abused its discretion by granting defendant an inadequate amount of attorney fees. We agree that the record does not support the trial court's award of only \$5,000 in attorney fees to be paid out of the parties' trust account and that the award is insufficient. We review a trial court's decision regarding an award of attorney fees for abuse of discretion. *Woodington*, 288 Mich App at 369. Factual findings are reviewed for clear error, while questions of law are reviewed de novo. *Myland*, 290 Mich App 691, 701-702; 804 NW2d 124 (2010).

Although subject to the trial court's discretion, the law permits an award of attorney fees to a party in a divorce action if: (1) the movant establishes his or her inability to pay their legal expenses; and (2) the nonmoving party is able to pay the movant's fees. MCR 3.206(C)(2)(a); *Myland*, 290 Mich App at 702. The award may only be provided to the extent "necessary to enable a party to prosecute or defend a suit." *Gates v Gates*, 256 Mich App 420, 438; 664 NW2d 231 (2003). A party should not be required to invade their own marital assets to pay for the legal fees when he or she must rely on them for support. *Myland*, 290 Mich App at 702. "[A] party sufficiently demonstrates an inability to pay attorney fees when that party's yearly income is less than the amount owed in attorney fees." *Id.*

In awarding defendant an additional \$5,000 from the parties' trust account, the trial court noted: "For the reasons stated above, an additional award of attorney's fees in Defendant's favor is appropriate. In this case, both parties have incurred exorbitant costs in attorney fees. The Plaintiff has expended over \$43,672 in attorney fees, all paid from marital funds. Pursuant to court documents, as of June 26, 2009, the Defendant had paid \$6,400 in attorney fees and had an outstanding balance of \$28,335.77. Prior to trial an additional \$5,000 had been awarded to Defendant for payment of attorney fees totaling \$11,400 that she had paid."

While the trial court was clearly amenable to an award of attorney fees in defendant's favor, we do not believe that the record supports the amount of the award, especially since the \$5,000 will be coming from the parties' trust account. The balance of defendant's fees far exceeds her annual salary. Additionally, plaintiff's devious conduct in drawing \$30,000 from the parties' equity line of credit allowed him to pay a great portion of his attorney fees, which the trial court found, and we agree, were incurred as a result of plaintiff's own ridiculous motions and vexatious tactics. "It was incumbent upon the trial court to consider whether attorney fees were necessary for plaintiff to defend her suit, including whether, under the circumstances, plaintiff would have to invade the same spousal support assets she is relying on to live in order to pay her attorney fees and whether, under the specific circumstances, defendant has the ability to pay or contribute to plaintiff's fees." *Myland*, 290 Mich App at 703. We do not believe the record supports the trial court's award.

We affirm the trial court's order with regard to distribution of the marital estate and the award of spousal support, but remand for further proceedings on the issue of attorney fees. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Kirsten Frank Kelly
/s/ Jane M. Beckering